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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WINDELL THREADGILL,

Petitioner,

v.

MOORE U.S.A., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the United States Equal Employment Opportunity Commission fail to provide adequate notice of Title VII's 90-day limitation on petitioner's right to sue, where it mailed the notice only to the petitioner despite the fact that his attorney of record had requested both issuance of the notice and that the attorney be sent a copy of it, where the E.E.O.C.'s normal policy is to mail a copy to the attorney, and where petitioner, therefore, reasonably expected his attorney would be sent a copy and would protect his rights?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions and Orders Below	1
Statement of the Basis for Jurisdiction	1
Statute and Rule Involved in the Case	1
Statement of the Case	2
Reasons for Granting the Writ	5
I. There Is A Conflict Between The Circuits As To Whether It Is Necessary To Serve A Claimant's Attorney Of Record With A Copy Of The Notice Of Right To Sue.	5
II. The United States Court Of Appeals For The Seventh Circuit Has Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court, And It Has Done So In A Way That Conflicts With This Court's Decisions In *Irwin v. Dep't Of Veterans Affairs* And *Zipes v. Trans World Airlines, Inc.*	8

Contents

Page

A. Where Petitioner's Attorney of Record Was Not Sent a Copy of the Notice of Right to Sue, Despite Explicitly Requesting Service upon Him When He Requested Issuance of the Notice on Behalf of His Client, Where the EEOC's Normal Policy Is to Mail a Copy to the Attorney, and Where Petitioner, Therefore, Reasonably Expected That His Attorney Would Receive a Copy and Protect His Rights, the 90-day Period of Limitations under 42 U.S.C. § 2000e-5(f)(1) Should Be Deemed to Commence When the Attorney Gained Actual Knowledge the Notice Had Been Issued. 12

B. Principles of Equitable Tolling Extend to the Facts of this Case, and, Therefore, the Action Was Timely Filed. 14

Conclusion 17

TABLE OF CITED AUTHORITIES

Page

Cases:

Baldwin County Welcome Center v. Brown,
466 U.S. 147 (1984) 16

Ball v. Abbott Advertising, Inc.,
864 F.2d 419 (6th Cir. 1988) 5, 6

Banks v. Rockwell Int'l. North American Aircraft Operations,
855 F.2d 324 (6th Cir. 1988) 5

Crown, Cork & Seal Co. v. Parker,
462 U.S. 345 (1983) 14

Irwin v. Dep't of Veterans Affairs,
498 U.S. 89 (1990) ..... *passim*

Jones v. Madison Service Corp.,
744 F.2d 1309 (7th Cir. 1984) 7, 9, 10, 14

Love v. Pullman Co.,
404 U.S. 522 (1972) 11

Noe v. Ward, 754 F.2d 890 (10th Cir. 1985) 7

Saxton v. American Tel. & Tel. Co.,
10 F.3d 526 (7th Cir. 1993) 7

Cited Authorities

Page

Seitzinger v. Reading Hospital & Medical Center,
165 F.3d 236 (3d Cir. 1999) 7

Stallworth v. Wells Fargo Armored Services Corp.,
936 F.2d 522 (11th Cir. 1991) 6, 9, 12, 13, 14

Thomas v. KATV Channel 7,
692 F.2d 548 (8th Cir. 1982) 7

Zipes v. Trans World Airlines, Inc.,
455 U.S. 385 (1982) 8, 11, 14

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 4

42 U.S.C. § 2000 *et seq.* 4

42 U.S.C. § 2000e-5(f)(1) 1, 5, 6, 7, 8, 12

42 U.S.C. § 2000e-16(c) 8

Rule:

Fed. R. Civ. P. 5(b) 2, 9, 13

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Seventh Circuit Decided October 19, 2001 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The Western District Of Wisconsin Entered December 11, 2000 ..... 7a

OPINIONS AND ORDERS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit, *Threadgill v. Moore U.S.A., Inc.*, No. 01-1051 (7th Cir. Oct. 19, 2001), is reported at 269 F.3d 848, and is reprinted at App. 1a. The Memorandum and Order of the United States District Court for the Western District of Wisconsin, entered December 11, 2000, is unreported but is reprinted at App. 7a.

STATEMENT OF THE BASIS FOR JURISDICTION

The Supreme Court has jurisdiction to review cases from the courts of appeals under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED IN THE CASE

42 U.S.C. § 2000e-5(f)(1), in pertinent part, states as follows:

> [I]f within one hundred and eighty days from the filing of such charge . . . , the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved. . . .

Fed. R. Civ. P. 5(b), in pertinent part, states as follows:

> Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney . . . shall be made by delivering a copy to the attorney . . . or by mailing it to the attorney . . . at the attorney's . . . last known address. . . . Service by mail is complete upon mailing.

STATEMENT OF THE CASE

Petitioner Windell Threadgill worked at the Monroe, Wisconsin manufacturing plant of Moore U.S.A., Inc., from May 23, 1983 until September 22, 1997. App. 2a. In January 1998, Threadgill filed a complaint with the Wisconsin Department of Workforce Development and the United States Equal Employment Opportunity Commission ("EEOC"), alleging he had been harassed, intimidated, denied promotional opportunities, and terminated from his employment on the basis of his African-American race. App. 2a.

While the administrative proceedings were pending, on October 11, 1999, David E. Lasker, Threadgill's attorney, sent to the EEOC's Milwaukee District Office a written request that the EEOC issue a notice of right to sue. App. 2a; District Court Docket No. 15 ("R.15") at Ex. 1. In the letter, Lasker reiterated that he was the attorney of record for Threadgill and said the request for the notice was being made by him on behalf of his client. *Id.* He also said, "Please be sure to send a copy of the notice to the undersigned at this address." *Id.*

On November 18, 1999, the EEOC mailed the notice to Threadgill, who received it soon thereafter. App. 2a. Lasker never received a copy of the notice from the EEOC, and it appears from the face of the notice itself that none was ever sent to him. App. 2a; R.15 at Ex. 2.

Although Threadgill had a high school education, it was difficult for him to read and understand legal documents. R.15. at ¶2. He had no prior experience in legal matters, and it was difficult for him to understand the technical legalities related to his claims. *Id.* at ¶¶2-3. He relied on his attorney to explain things to him and to handle legal concerns on his behalf. *Id.* at ¶3. Based upon his receipt of the copy of Lasker's October 11, 1999 letter, it was Threadgill's understanding that his lawyer was to receive a copy of the notice. *Id.* at ¶¶4-5. He placed the notice with his other papers regarding the case and awaited further developments. *Id.* at ¶5.

On June 16, 2000, well past the 90-day limit for filing suit, while Threadgill and Lasker were conversing by telephone, Lasker learned for the first time of the existence of the notice. App. 2a; R.14 at ¶3. At Lasker's request, Threadgill immediately faxed a copy of the notice to him and sent a photocopy of it to him by mail. R.14 at ¶4.

When Threadgill originally received the notice, he had no idea that he would be the only one receiving the document. R.15 at ¶9. No other document had been received by Threadgill regarding his case without a copy of it also being sent to his attorney. *Id.* Prior to receiving the notice, anytime Threadgill received a document either from the Equal Rights Division of the Wisconsin Department of Workforce Development or the EEOC, Lasker also received a copy. *Id.*

By the time he received the notice, Threadgill had come to rely upon the fact that his lawyer always got a copy of anything that came to him from those agencies. *Id.*

It is the policy, and the usual practice, of the Milwaukee District Office of the EEOC to send a copy of the notice to the attorney of record for the claimant. R.14 at Ex. 1. The EEOC Compliance Manual provides that a copy of the notice should be sent to the claimant's attorney. *See infra* at 13.

The instant action was commenced on September 11, 2000, less than 90 days after Lasker first gained knowledge of the issuance of the notice. The district court had jurisdiction pursuant to 28 U.S.C. § 1331, regarding federal questions arising under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e *et seq.*). After giving the parties opportunity to present all relevant material, the district court ordered on December 11, 2000 that Moore's motion for summary judgment be granted and that Threadgill's complaint be dismissed as time-barred with prejudice and costs. App. 3a. Threadgill appealed, and on October 19, 2001, the United States Court of Appeals for the Seventh Circuit entered its opinion affirming the judgment of the district court. This Petition for a Writ of Certiorari has been timely filed.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT BETWEEN THE CIRCUITS AS TO WHETHER IT IS NECESSARY TO SERVE A CLAIMANT'S ATTORNEY OF RECORD WITH A COPY OF THE NOTICE OF RIGHT TO SUE.

This case turns upon the ques on of whether 42 U.S.C. § 2000e-5(f)(1) permits the EEOC to ignore the attorney of record for a party and serve only the party, personally, with the important notice that the right to sue will expire if no action is taken within 90 days. Is it necessary to include the party's lawyer "in the loop" to ensure that the represented party is not denied access to the courts?

The Seventh Circuit in *Threadgill v. Moore U. S. A., Inc.*, 269 F.3d 848 (7th Cir. 2001), answered "no" to that question. App. 6a. The court stated plainly that "the attorney's receipt is irrelevant." App. 4a. The same stance has been taken by the Sixth Circuit, which "has flatly rejected the argument that the failure by the EEOC to copy counsel on a right-to-sue letter prevents the ninety-day period from running." *Ball v. Abbott Advertising, Inc.*, 864 F.2d 419, 421 (6th Cir. 1988), *citing Banks v. Rockwell Int'l North American Aircraft Operations*, 855 F.2d 324, 326 (6th Cir. 1988).[1]

1. The ruling in *Ball*, on the basis of the decision in *Banks*, evidences a lack of explicit treatment of the issue by the Sixth Circuit. In *Banks*, the court actually did not address the issue for which *Banks* is cited as authority in *Ball*. In fact, in *Banks* the court specifically noted "appellant's argument that the *EEOC Compliance Manual* requires the Commission to send counsel a copy of the notice of right to sue was not presented to the district court nor did the district court consider such contention." 855 F.2d at 326. Because appellant's brief "[did] not squarely present the argument pressed . . . on appeal," the court declined to review the argument or decide the issue. *Id.*

The Eleventh Circuit takes a different view from that of the Sixth and Seventh Circuits on the question of the need to serve the complainant's attorney. In *Stallworth v. Wells Fargo Armored Services Corp.*, 936 F.2d 522 (11th Cir. 1991), the court vacated the district court's dismissal of Stallworth's Title VII claim on timeliness grounds, where the EEOC did not send a copy of the right-to-sue letter to Stallworth's attorney. The court said:

> We conclude that the primary fault for the failed delivery in this case rests upon the EEOC because of its failure to mail a copy of the right-to-sue letter to Stallworth's attorney. Not only was the EEOC expressly requested to mail a copy to the attorney, but also the EEOC Compliance Manual provides that a copy of the right-to-sue letter should be sent to the claimant's attorney.

936 F.2d at 525 (footnotes omitted).[2] The ruling by the Eleventh Circuit on the issue raised in the case at bar cannot be reconciled with the handling of the issue by the Seventh Circuit in *Threadgill* and the Sixth Circuit in *Ball*.

Threadgill, *Ball*, and *Stallworth* are the only cases petitioner has been able to locate among all the circuits in which the issue of timeliness under 42 U.S.C. § 2000e-5(f)(1)

2. In *Stallworth*, the plaintiff also did not personally receive the notice, due to various address problems involving no fault of her own. 936 F.2d at 525. The law in the Eleventh Circuit requires the claimant to assume "some minimum responsibility" to ensure receipt of the notice of right to sue. *Id.* at 524. The court found that the most significant action Stallworth took in successfully carrying her minimum burden was "[to request] the EEOC to mail a copy of the right-to-sue letter to her attorney at *his* address." *Id.* (emphasis added).

arose where the claimant's attorney of record was not served with a copy of the notice. All other reported cases involve either (1) service of the notice upon an unrepresented claimant, (2) service only upon the claimant's attorney,[3] or (3) service upon both the claimant and the attorney.[4] The latter situation, where both attorney and client have been served, is the most usual fact situation in the cases involving issues of timeliness under 42 U.S.C. § 2000e-5(f)(1). Whichever of the three permutations may be involved, none of the other reported cases applies to this case, where petitioner's attorney was not served and was simply ignored, without the client's knowledge or the attorney's knowledge, under circumstances in which the client was induced to believe a copy would be sent to his attorney in order for the attorney to act to protect his rights.

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3. *See, e.g., Jones v. Madison Service Corp.*, 744 F.2d 1390 (7th Cir. 1984).

4. *See, e.g., Seitzinger v. Reading Hospital & Medical Center*, 165 F.3d 236 (3d Cir. 1999); *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 532 n.11 (7th Cir. 1993); *Thomas v. KATV Channel 7*, 692 F.2d 548 (8th Cir. 1982); *Noe v. Ward*, 754 F.2d 890 (10th Cir. 1985).

II. THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND IT HAS DONE SO IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISIONS IN *IRWIN v. DEP'T OF VETERANS AFFAIRS* AND *ZIPES v. TRANS WORLD AIRLINES, INC.*

Although this Court has not examined the necessity of serving an attorney of record under 42 U.S.C. § 2000e-5(f)(1), it has ruled on the importance of serving the lawyer under similar circumstances. In *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990), the Court faced an analogous situation. A discharged federal government employee brought an employment discrimination action after she and her attorney received copies of an EEOC notification letter informing them, pursuant to 42 U.S.C. § 2000e-16(c), that the action had to be commenced within thirty (30) days of receipt of the notice. 498 U.S. at 91. The letter, which was dated March 19, 1987, was received at the attorney's office on March 23, 1987, while the attorney was out of the country, and he did not learn of it until his return on April 10, 1987. *Id.* The employee received her copy of the letter on April 7, 1987. *Id.* Her complaint was filed on May 6, 1987, 44 days after the notice was received at her attorney's office, but only 29 days after it had been received by the plaintiff. *Id.* The Court held that the complaint was untimely, because it was first received at the attorney's office more than 30 days before the action was commenced. *Id.* at 92.

The Court focused upon the importance of including the attorney in the process. 498 U.S. at 93. It referred to the

provisions of Fed. R. Civ. P. 5(b), which state, "Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court." *Id.* The Court said, "To read the term 'receipt' to mean only 'actual receipt by claimant' would render the practice of notification through counsel a meaningless exercise." *Id.* It added, "If Congress intends to depart from the common and established practice of providing notification through counsel, it must do so expressly." *Id.* The Court also noted the importance of service upon the litigant's attorney, as provided in Fed. R. Civ. P. 5(b), in order to avoid "factual disputes about when actual notice was received" and "uncertainty in an area of the law where certainty is much to be desired." *Id.*[5]

Although the facts of the case at bar are somewhat different, it is patent that an attorney's lack of receipt of the notice is a significant problem, as the Eleventh Circuit acknowledged in *Stallworth* and the Seventh Circuit failed to see in *Threadgill*. The point was underscored by Justice Stevens in *Irwin*, when he said, "Actually, notifying both the claimant and his representative makes sense . . . [because] [d]ual notification ensures that all persons concerned with the progress of the action are apprised of important developments." 49 U.S. at 101 (Stevens, J., concurring in part and dissenting in part).

In *Jones v. Madison Service Corp.*, 744 F.2d 1309 (7th Cir. 1984), the case upon which the court relied most

5. If the Court grants this Petition and decides the question presented, it would close the last major loophole of uncertainty remaining after its decision in *Irwin* and would obviate a great deal of future litigation over timeliness issues in all the circuits.

heavily in *Threadgill*, *see* App. 3a-4a, the Seventh Circuit itself realized and emphasized the importance of placing the attorney at the center of the process. In *Jones*, the court specifically acknowledged "the risk that a claimant could remain in ignorance of his rights until the time to sue had passed" if his attorney is not notified of the issuance of the notice. 744 F.2d at 1312. The court said, "This danger is not present when [the attorney receives the notice], [because the attorney is] the individual in charge of proceeding with the litigation and aware, perhaps more than the claimant, of the importance of such notice." *Id.*[6]

In addition to relying upon the decision in *Jones*, the court in *Threadgill* relied upon this Court's decision in *Irwin*. *See* App. 4a. The court rested its decision upon both precedents as authority for the rule that the 90-day limitation period starts to run when the notice is received "*either by the claimant or by the attorney representing him in the Title VII action*." App. 3a (emphasis in the original).

The "either/or" rule had been established in numerous circuits, including the Seventh Circuit, prior to this Court's decision in *Irwin*. *See, e.g.*, *Jones*. After *Irwin*, naturally, all courts refer to it as the controlling precedent for the "either/or" rule. *See* 498 U.S. at 92 (notice is "received" when delivered "to a claimant or the claimant's attorney, whichever comes first"). However, applying the "either/or" rule in the context of this case is inapposite and nonsensical; the rule was developed and (before *Threadgill* and *Ball*) applied only

6. In *Jones*, the attorney received the notice and the clients did not. 744 F.2d at 1311. Therefore, ironically, the court underscored *the significance of actual receipt of the notice by the attorney*, as a basis for affirming the district court's dismissal of the action on the grounds that it was not timely commenced. *Id.* at 1314.

in the context where the aggrieved party's attorney *received* the notice, usually in close proximity to the time it was received by the client. "Either/or" logically implies receipt by two addressees, not just one. The Court in *Irwin* would not have said "whichever comes *first*" (emphasis added) in stating the rule, had it not intended the rule to apply where *both* the attorney and client received notice.

Thus, the decision in *Irwin* is distinguishable, because the EEOC did not serve the petitioner's lawyer with notice in this case. The issue petitioner seeks to bring before the Court has never been truly or fairly decided on its merits.

The Supreme Court has issued "previous admonitions that Title VII, a remedial statute, should be construed in favor of those whom the legislation was designed to protect." *Irwin*, 498 U.S. at 102 (Stevens, J., concurring in part and dissenting in part), *citing Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397-98 (1982); *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972). The Seventh Circuit failed to do so in this case.

A. Where Petitioner's Attorney of Record Was Not Sent a Copy of the Notice of Right to Sue, Despite Explicitly Requesting Service upon Him When He Requested Issuance of the Notice on Behalf of His Client, Where the EEOC's Normal Policy Is to Mail a Copy to the Attorney, and Where Petitioner, Therefore, Reasonably Expected That His Attorney Would Receive a Copy and Protect His Rights, the 90-day Period of Limitations under 42 U.S.C. § 2000e-5(f)(1) Should Be Deemed to Commence When the Attorney Gained Actual Knowledge the Notice Had Been Issued.

Referring to 42 U.S.C. § 2000e-5(f)(1), the court in *Threadgill* acknowledged that "the statute itself does not specify who the recipient of the notice must be." App. 3a. The ambiguity in applying the statute to the facts of each case must be resolved by judicial interpretation. Proper application of the principles that underlie *Irwin* should lead to the opposite result from that reached by the Seventh Circuit in the case at bar.[7]

The statute states that "the Commission . . . shall . . . notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought. . . ." 42 U.S.C. § 2000e-5(f)(1). The question presented is whether proper notice under the statute must be given to a represented claimant's attorney, and the strong sense of the Court's decision in *Irwin* is that the answer should be in the affirmative.

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7. The Eleventh Circuit in its decision in *Stallworth*, which is contrary to that of the Seventh Circuit in *Threadgill*, specifically noted that it deemed its decision to be consistent with this Court's decision in *Irwin*. *Stallworth*, 936 F.2d at 525 n.4.

As noted earlier, the lynchpin of the *Irwin* decision was Fed. R. Civ. P. 5(b), requiring service upon the attorney of a represented party by mail or delivery to the attorney's office. 489 U.S. at 93. Strong policy considerations support the application of Rule 5(b) in resolving ambiguity and applying the instant statute. *See id.*; *see also supra* at 8-9. For 65 years, since 1937, Rule 5(b) has stood the test of time and become the undisputed standard for all dealings with a represented party. It is appropriate to read the statute in the context of the time-honored and generally accepted rule. It is reasonable to expect all those engaged in the litigation process to abide by the rule, and the Court can take judicial notice that contacting a party through the party's counsel is at the heart of every code of professional ethics governing lawyers throughout the land.

Probably for those reasons, the published policy of the EEOC is to mail a copy to claimant's attorney. *See Stallworth*, 936 F.2d at 525, text & n.3 (§ 6.4(b) of the EEOC Compliance Manual provides that a copy of the right-to-sue letter should be sent to the claimant's attorney). *See also* Appendix of Plaintiff-Appellant (petitioner herein) in the court below, at A25 (when notice of right to sue is given by the Civil Rights Division of the United States Department of Justice, the *only* notice sent to the represented claimant is given by addressing it to him *in care of his attorney at his attorney's address*).

Other important policy considerations also support the conclusion that service upon the attorney is required. A decision in favor of the petitioner would encourage claimants to trust the legal system and their lawyers. A contrary decision, as in the opinion of the Seventh Circuit in this case, has the opposite effect. It sends the message that the system is not to be trusted and that the EEOC in

particular cannot be relied upon to follow its own policies. It says that the EEOC, a government agency, can ignore a party's legal counsel to the detriment of that party.

If the decision in *Threadgill* stands, it would cause litigants to worry that they must micro-manage their cases even though they are supposed to be in the capable hands of qualified legal counsel. In that way, it would impede the attorney-client relationship and, ultimately, could discourage litigants from seeking legal counsel. Yet, it is in the best interests of all concerned to have legal representation for parties seeking redress.

B. Principles of Equitable Tolling Extend to the Facts of this Case, and, Therefore, the Action Was Timely Filed.

The statutory time limits applicable to lawsuits under Title VII are subject to equitable tolling. *Irwin*, 498 U.S. at 95; *Zipes*, 455 U.S. at 394; *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349, n.3 (1983); *Jones*, 744 F.2d at 1314. Equitable tolling applies in situations where the claimant has been prevented in some extraordinary way from filing his complaint in time. *Irwin*, 498 U.S. at 96; *Threadgill*, App. 4a; *Jones*, 744 F.2d at 1314.

In this case, the Court of Appeals held that principles of equitable tolling do not apply to petitioner, because "[h]e did not act at all" after he received the notice of right to sue. App. 5a. But why should he have acted? As the Eleventh Circuit noted in *Stallworth*, a claimant who hires an attorney and affirmatively requests that the EEOC notify the attorney of the issuance of the notice of right-to-sue is, reasonably speaking, already actively pursuing his legal remedies so as to qualify for equitable relief. 936 F.2d at 525. A reasonable

person in petitioner's situation could be expected to do as he did – rely upon the system to work as it should and upon his attorney to do what he was hired to do.

Petitioner did nothing to cause the EEOC's failure to notify his attorney, and he has "clean hands." He was led to believe that his attorney would be receiving a copy of the notice, both because the attorney explicitly requested that of the EEOC and because it was his normal experience as the claimant in this matter that his lawyer received originals or copies of every document that also came to him. Therefore, when he received his copy of the notice there was no reason for him to take any further action personally.[8] Such circumstances constitute grounds for equitable tolling.

The instant action is distinguishable from the leading cases in this Court in which equitable tolling was held not to apply. In *Irwin*, the Court found equitable tolling inapplicable and eschewed what it called "at best a garden variety claim of excusable neglect." 498 U.S. at 96. The neglect there was of an attorney who did not file suit on time after *having been served* with the notice. The mistake was his, not the EEOC's, and his error truly was the sort of thing that, regretfully, occurs every day among lawyers. His office received the notice, and a professional office is equipped to deal with that kind of matter on a routine basis. The underlying principle of *having* representation is to prevent folly like that which has occurred because of the agency's failure in this case.[9]

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8. Petitioner's attorney, also relying upon the good-faith belief that he would receive a copy of the notice, based upon both his request and the normal policy of the EEOC, was reasonable in his belief that the notice of right to sue had not been issued.

9. As the Court of Appeals noted in this case, *Irwin* made reference to the "adversary's misconduct" having to do with allowing

(Cont'd)

In *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), the Court held that the failure to file suit within the 90-day period was no basis for equitable tolling, where the district court had specifically informed the plaintiff of the 90-day requirement and a federal magistrate had reminded her of it. 466 U.S. at 151. The plaintiff was told three times what she needed to do to preserve her claim, and she did not do it. *Id.* The situation in *Brown* was substantially different from the case at bar.

It is profoundly unjust to deny petitioner his day in court where the EEOC failed to do its job and thereby rendered his attorney unable to do his. This case presents the unusual circumstances which justify invoking the doctrine of equitable tolling.

(Cont'd)
the filing deadline to pass. *See* App. 5a; *Irwin*, 498 U.S. at 96. In the case at bar, there was a breach of duty by a government agency, instead of adversarial misconduct. Where principles of equity are concerned, it is logical to view government misconduct as an even stronger basis for relief than misconduct by an adverse party. To do so would not be unfair in this case. The record is devoid of evidence or argument that a ruling in favor of the petitioner would prejudice or otherwise harm the respondent.

CONCLUSION

For the foregoing reasons, petitioner requests that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Dated: January 17, 2002

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED OCTOBER 19, 2001

In the

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-1051

WINDELL THREADGILL,

Plaintiff-Appellant,

v.

MOORE U.S.A., INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 00-C-0553—**John C. Shabaz, *Judge***

ARGUED SEPTEMBER 5, 2001
DECIDED OCTOBER 19, 2001

Before FLAUM, *Chief Judge*, and POSNER and RIPPLE, *Circuit Judges*.

FLAUM, *Chief Judge*. Plaintiff Windell Threadgill appeals the district court's grant of summary judgment in favor of the defendant on plaintiff's Title VII claim and dismissal of plaintiff's complaint as time-barred. For the reasons stated herein, we affirm.

Appendix A

I. Background

Threadgill worked at the Monroe, Wisconsin manufacturing facility of Moore U.S.A., Inc. ("Moore") from May 23, 1983, until September 22, 1997. In January 1998, Threadgill filed a complaint with the Wisconsin Department of Workforce Development and the United States Equal Employment Opportunity Commission ("EEOC"), alleging that he had been harassed, intimidated, denied promotional opportunities, and terminated based on race. The Wisconsin agency dismissed the complaint, and Threadgill eventually withdrew his appeal of that determination.

This opinion concerns the complaint filed with the EEOC. On October 11, 1999, David Lasker, Threadgill's attorney, sent to the EEOC's Milwaukee District Office a written request for a right-to-sue notice. In this letter, Lasker requested a copy of the notice. On November 18, 1999, the EEOC mailed the notice to Threadgill who received it soon thereafter. Threadgill did not immediately inform Lasker of the notice. In fact, Threadgill put the notice aside and neither acted on it nor mentioned its existence to his attorney for nearly seven months. Lasker never received a copy of the right-to-sue letter from the EEOC. It was not until June 16, 2000, that Lasker discovered that Threadgill had received the notice—well past the 90-day limit for filing suit. Although the notice clearly stated that the lawsuit "must be filed within 90 days of your receipt of this Notice," neither Threadgill nor Lasker took action within 90 days. On September 6, 2000, Lasker requested a second right-to-sue notice. In that letter, he claimed that because he did not receive a copy as requested, a second notice should be issued. The EEOC

denied Lasker's request, and Plaintiff brought his Title VII claim in the Western District of Wisconsin on September 11, 2000. After giving the parties opportunity to present all relevant material, the district court ordered on December 11, 2000, that Moore's motion for summary judgment be granted and that Threadgill's complaint be dismissed as time-barred with prejudice and costs.

II. Discussion

We review the district court's grant of summary judgment *de novo,* construing all of the facts and reasonable inferences that can be drawn from those facts in favor of the nonmoving party. *See Central States, Southeast & Southwest Areas Pension Fund v. Fulkerson*, 238 F.3d 891, 894 (7th Cir.2001). A grant of summary judgment is appropriate if the pleadings, affidavits, and other supporting materials leave no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

A.

A civil action alleging a Title VII violation must be filed within 90 days of receiving a right-to-sue notice from the EEOC. 42 U.S.C. § 2000e-5(f)(1). Although the statute itself does not specify who the recipient of the notice must be, our case law is unambiguous. "The 90-day period of limitation set forth in 42 U.S.C. § 2000e-5(f)(1) begins to run on the date that the EEOC right-to-sue notice is actually received *either by the claimant or by the attorney representing him in the Title VII action.*" *Jones v. Madison Service Corp.*, 744 F.2d 1309, 1312 (7th Cir.1984) (emphasis added);

see also Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 92 (1990); *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 532 n. 11 (7th Cir.1993). Threadgill's contention that the 90-day period should have begun to run only after his attorney received the notice is a misreading of the precedent. Two types of receipt of a right-to-sue notice can start running the 90-day limitation period, and each does so equally well: actual receipt by the plaintiff, and actual receipt by the plaintiff's attorney (as such receipt constitutes constructive receipt by the plaintiff). *See Jones*, 744 F.2d at 1312. Both methods of receipt focus on notice to the plaintiff. The attorney's receipt is pertinent only because he is an agent of the plaintiff. If, as in the instant case, the plaintiff actually receives notice from the EEOC, the attorney's receipt is irrelevant; it simply is not required for the 90-day period to begin running. Threadgill takes the holdings of Supreme Court and Seventh Circuit case law, which state that the 90-day period begins upon notice to the attorney *or* to the plaintiff, and reads them to state that *only* upon notice to the attorney does the clock begin to tick. Nowhere in our case law is such a result suggested.

B.

Threadgill next contends that the principle of equitable tolling should be applied to excuse his failure to comply with the 90-day limitations period. Equitable tolling, however, is reserved for situations in which the claimant "has made a good faith error (*e.g.*, brought suit in the wrong court) or has been prevented in some extraordinary way from filing his complaint in time." *Jones*, 744 F.2d at 1314. Threadgill did not make a good faith error such as filing in the wrong court.

He did not act at all, even though the right-to-sue notice clearly stated that he must file within 90 days. The courts have allowed equitable tolling where the claimant "has *actively* pursued his judicial remedies . . . or has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96 (emphasis added). To say that a claimant who receives the notice but does not read it or ask his attorney to explain it within the 90 days should be exempt from the limitations period under the principle of equitable tolling renders the procedural rule itself meaningless. Threadgill's contention that the EEOC induced or tricked him into allowing the deadline to pass by failing to send a copy of the notice to his attorney is unsupported.[1] The EEOC did not act deceitfully. It sent Threadgill a right-to-sue notice that clearly indicated the 90-day limitation. The failure to send a copy to the attorney does not amount to trickery or inducement. While Threadgill's failure to understand the implications of the right-to-sue notice elicits sympathy, "[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984).

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1. Threadgill's claim that the EEOC misled him into allowing the deadline to pass cites language from a case that would allow equitable tolling because of an adversary's trickery. *See Irwin*, 498 U.S. at 96. Whether any alleged malfeasance by the EEOC would also suffice to toll the limitations period is an issue that we need not reach as there is no support for any claim of trickery or inducement by the EEOC.

Appendix A

III. Conclusion

Because the 90-day period of limitations begins when either the complainant or his attorney receives the right-to-sue notice, and because the doctrine of equitable tolling does not apply, Threadgill's suit is time-barred and we AFFIRM the judgment of the district court.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN ENTERED DECEMBER 11, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

00-C-553-S

WINDELL THREADGILL,

Plaintiff,

v.

MOORE U.S.A., Inc.,

Defendant.

MEMORANDUM AND ORDER

Plaintiff Windell Threadgill commenced this civil action pursuant to Title VII alleging that defendant Moore U.S.A., Inc. subjected him to a hostile work environment and discriminated against him on the basis of his race. He also alleges he was retaliated against for complaining about discrimination.

On October 26, 2000 defendant filed a motion to dismiss or in the alternative a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law, affidavits and a brief in support thereof. The Court pursuant

to Rule 12 (b) (6) has treated the motion as one for summary judgment the parties having been given reasonable opportunity to present all material relevant to such a motion by Rule 56 which has now been fully briefed.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendant's motion for summary judgment the Court finds there is no genuine dispute as to any of the following material facts.

Appendix B

Plaintiff Windell Threadgill is an adult resident of Freeport, Illinois. Defendant Moore U.S.A., Inc., is an Illinois corporation which operates a manufacturing facility located in Monroe, Wisconsin. Plaintiff was employed at the Monroe facility from May 23, 1983 until September 22, 1997.

On January 29, 1998 plaintiff filed a complaint with the Wisconsin Department of Workforce Development (the Department) and the United States Equal Employment Opportunity Commission (EEOC) alleging that he had been harassed, intimidated, denied training and promotional opportunities and terminated because of his race by the defendant. The Department dismissed the complaint on June 14, 1999 finding no evidence that plaintiff had been discriminated against. Plaintiff appealed the determination but later withdrew the appeal.

On October 11, 1999 plaintiff's counsel, David E. Lasker, wrote a letter to the Director of the Milwaukee District Office of the EEOC requesting the issuance of a Notice of Right to Sue letter and that he be sent a copy of the letter. The EEOC issued the letter on November 18, 1999. Thereafter plaintiff received the Notice of Right to Sue letter by mail which states: "Your lawsuit under Title VII or the ADA **must be filed in federal court *WITHIN 90 Days* of your receipt of this Notice.**"

On June 16, 2000 plaintiff had a conversation with his attorney at which time counsel discovered plaintiff had previously received the Notice of Right to Sue letter the preceding November. Plaintiff faxed counsel the letter June 16, 2000 after the conversation of that day. On September 6,

2000 plaintiff's attorney wrote the EEOC requesting issuance of a second notice of right to sue letter because he had not received a copy of the first one. His letter states:

> Very recently, it has come to my attention that you issued a Notice of Right to Sue on or about November 18, 1999 in the above captioned matter. You never sent me a copy of the Notice of Right to Sue, despite my explicit request in my letter requesting the issuance of it that you send a copy to me as well as to my client.

On September 11, 2000 the EEOC denied the request of plaintiff's counsel. Plaintiff commenced this lawsuit the same day.

MEMORANDUM

Defendant contends that plaintiff's claims under Title VII are time-barred. A civil action alleging violations of Title VII must be filed within 90 days of receiving a right-to-sue notice. 42 U.S.C. § 2000e-5(f)(1). The time period commences when a claimant has actual knowledge of the Notice of Right to Sue letter. *Jones v. Madison Service Corp.*, 744 F. 2d 1309, 1313 (7th Cir. 1984). The Court stated: "such knowledge is conveyed equally well through personal receipt of the right-to-sue letter by the claimant and through receipt of that letter by the attorney representing him in the action."

According to *Jones*, the 90 day time period to file a federal lawsuit commenced on the day shortly after November

18, 1999 when plaintiff personally received the Notice of Right to Sue letter. Plaintiff's argument that the time period did not begin until his counsel received the notice on June 16, 2000 is inconsistent with *Jones*. Plaintiff had 90 days from the date he received the Notice of Right to Sue letter in November 1999 to file his lawsuit. He failed to do so. Accordingly, his Title VII claims are time barred.

Equitable tolling of the 90 days applies in limited circumstances when disability or circumstances beyond a party's control make it impossible for a party to file suit within the statutory period. *Miller v. Runyon*, 77 F.3d 189, 191 (7th Cir. 1996). Equitable tolling is to be reserved only for situations where the claimant has made a good faith error or has been prevented in some extraordinary way from filing his complaint in time. *Jones*, 744 at 1314.

In this case plaintiff received the Notice of Right to Sue letter in November 1999 which clearly advised that he had 90 days to file a federal lawsuit. He did nothing, relying on the fact that his attorney would receive a copy of the letter. This does not constitute a good faith error or extraordinary circumstances. Upon the receipt of the letter he failed to contact his lawyer. Where he had no attorney it would have been his responsibility to file the lawsuit.

After requesting from the EEOC the Notice of Right to Sue letter in October 1999 counsel failed to take any further steps until June 16, 2000. At that time he talked to plaintiff and determined plaintiff had received the letter about seven or eight months earlier. Counsel did nothing until September 6, 2000 when he requested a second Notice of

Appendix B

Right to Sue letter. When his request was denied he filed this lawsuit. Equitable tolling is not applicable to this case where neither plaintiff not his counsel pursued this matter in a timely fashion.

Defendant's motion for summary judgment will be granted, and plaintiff's claims will be dismissed as time-barred. Defendant's claim that it was not properly served with a summons is moot because of this dismissal.

ORDER

IT IS ORDERED that defendant's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendant against plaintiff DISMISSING his complaint and all claims contained therein as time-barred with prejudice and costs.

Entered this 11th day of December, 2000.

BY THE COURT:

s/ John Shabaz
JOHN C. SHABAZ
District Judge